

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**CRIMINAL APPEAL No. 372 of 1999****For Approval and Signature:****HONOURABLE MR.JUSTICE A.M.KAPADIA****HONOURABLE MS.JUSTICE H.N.DEVANI**

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1 Whether Reporters of Local Papers may
be allowed to see the judgment ?

2 To be referred to the Reporter or not
?

3 Whether their Lordships wish to see
the fair copy of the judgment ?

Whether this case involves a
substantial question of law as to the
4 interpretation of the constitution of
India, 1950 or any order made
thereunder ?

5 Whether it is to be circulated to the
civil judge ?

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SURSINH MANSINH JADAV - Appellant(s)**Versus****STATE OF GUJARAT & 1 - Opponent(s)**

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Appearance :

MR ANIL N MEHTA for Appellant(s) : 1, MR ALPESH J
PATEL for Appellant(s) : 1 Appointed by Legal Aid
MR. R.C.KODEKAR APP for Respondent

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CORAM : HONOURABLE MR.JUSTICE A.M.KAPADIA**and****HONOURABLE MS.JUSTICE H.N.DEVANI****Date : 24th, 27th and 30th August 2007****ORAL JUDGMENT**

(Per : HONOURABLE MR.JUSTICE A.M.KAPADIA)

- 1.Appellant ("the Accused" for short) and other 8 accused were charged and tried by the learned Additional Sessions Judge, District Kheda at Nadiad for commission of the offences punishable under Sections 143, 147, 148, 149, 323, 324, 302 and 504 of the Indian Penal Code ("IPC" for short) on the accusation that they formed an unlawful assembly with a common object to cause grievous hurt to the complainant - PW1 - Laxmansinh Jenabhai Jadav and his family members, and in furtherance of their common object, they attacked the complainant and his family members by giving stick blow, as a result of which the complainant's son - Champaksinh Laxmansinh sustained stick injuries on his head and succumbed to the said injuries.
- 2.At the end of the trial, the Accused was found guilty of the offence of murder of Champaksinh Laxmansinh, punishable under Section 302. He was, therefore, convicted vide judgment and order dated 26.2.1999 and sentenced to imprisonment for life and fine of Rs.1000/- and in default of payment of fine RI for 3 months.
- 3.The Accused, aggrieved by the judgment and order of conviction and sentence, has filed the instant Appeal with the aid of Section 374 of The Code of Criminal Procedure ("the Code" for short).

4. The accusations which led to the trial of the Accused are essentially as follows:

4.1 As per the prosecution case, on 28.3.1998 at 1:30 pm, all the 8 Accused formed an unlawful assembly at Sarol Village of Borsad Taluka, District Anand. Their common object of forming the said unlawful assembly, was to cause grievous hurt to the complainant - PW-1 Laxmansinh Jenabhai Jadav and his family members. They were armed with bamboo and wooden sticks. In furtherance of their common object, they attacked the complainant and his family members. The Accused No.1 - Mansinh Janabhai Jadhav had given a stick blow on the head of the complainant, Accused No.7 - Sursinh Mansinh had given stick blow to Champaksinh Laxmansinh on his head, Accused Nos. 1 to 7 had given kick and fist blows to the complainant's wife Gajraben.

4.2 Hearing the shouts of the complainant and his family members, Sarpanch Bhupatsinh Chhaganbhai Jadav and Gulabsinh Fulsinh Jadav reached the place of the incident and had taken the injured complainant PW-1 Laxmansinh Janabhai Jadav, complainant's son - Champaksinh Laxmansinh and complainant's wife Gajraben Laxmansinh to Karamsad Hospital, where they were admitted as indoor patients. The condition of Champaksinh Laxmansinh was very serious, as he had received head injuries. He was, therefore, referred to Baroda Hospital for further

investigation. Thereafter he was brought back to Karamsad Hospital, where he died during the treatment.

4.3 As per the case of the prosecution, the Accused persons formed an unlawful assembly, and continued it being its members armed with deadly weapons like bamboo and wooden sticks, and committed the offence of rioting, and in furtherance of their common object, they murdered Champaksinh Laxmansinh and caused serious injuries to Laxmansinh Janabhai Jadav and Gajrabai Laxmansinh. They also insulted the complainant and his family members in order to provoke the breach of peace. Thereby, the Accused persons committed the offences punishable under Sections 143, 147, 148, 149, 302, 323, 324 and 504 IPC.

4.4 The complaint for the aforesaid incident was lodged against the accused persons by PW-1 Laxmanbhai Jenabhai Jadev at Bhadran Police Station, where it was registered vide C.R.No. I 17/98 on 29.3.98 for commission of the offences punishable under Sections 143, 147, 148, 149, 302, 323, 324 and 504 IPC.

4.5 Pursuant to the registration of the complaint, investigation was put into motion. PW-12 - Sirajhusain Kasamali, P.S.O. held inquest on the dead body of the deceased in the presence of the panchwitness and thereby dead body of the deceased was sent for autopsy. He

has also drawn the panchnama of the scene of offence and recorded the statement of the witnesses. He has also drawn the panchnama of the weapons produced by the accused. He has also drawn the panchnama of the clothes recovered from the dead body of the deceased and sent it to FSL. Thereafter, he arrested the Accused.

4.6 On completing the investigation, one Accused Sitaben, who was below 16 years, was sent to Juvenile court for trial. Thereafter, as the incriminating evidence was found against the accused, he filed charge sheet against the 8 Accused in the court of learned JMFC, Borsad on 14.5.98 for commission of the offences punishable under Sections 143, 147, 148, 149, 302, 323, 324 and 504 IPC.

4.7 As the offence punishable under Section 302 is exclusive triable by the learned trial Judge, the learned JMFC committed the case to the Court of Sessions at Nadiad.

4.8 The learned trial Judge to whom the case was made over for trial, framed charge against the Accused and another 7 Accused. All of them pleaded not guilty, and therefore, they were put to trial by the learned Additional Sessions Judge, Nadiad in Sessions Case No. 187 of 1998.

4.9 To prove the the culpability of the

accused, the prosecution has examined as many as 13 witnesses, the details of which have been given in paragraph 4 of the impugned judgment and order. They are as under:

PW No.	Name	Exh.No.	Page No.
1	Laxmanbhai Jenabhai	13	115
2	Mafatbhai Bhupatbhai	15	127
3	Budhabhai Vajesinh Jadav	17	131
4	Gajraben Laxmanbhai	19	135
5	Fatesing Khudsung	20	139
6	Shardaben Laxmanbhai	21	143
7	Dr. Sunilbhai Bipinchandra Bhatt	22	147
8	Manubhai Prabhudas	25	159
9	Kalpeshbhai Bachubhai	30	173
10	Chandrakant Shivdas Sonar	33	181
11	Dr. Jigar Maheshbhai	36	187
12	Sirajhusain Kasamali	41	217
13	Kalyansinh Vaghubha	45	225

4.10 To prove the charge leveled against the accused, the prosecution has also produced number of documents and relied upon the contents of the same. They are as under:

Srl. No.	Particulars	Exhibit	Page No.
1.	Complaint dated 29.3.1998	14	123
2.	Inquest panchnama dated 29.3.98.	16	129

Srl. No.	Particulars	Exhibit	Page No.
3.	Panchnama of place of offence dated 29.3.98.	18	133
4.	The panchnama showing the physical state of accused no.1 to 6 and also production of muddamal dated 29.3.98.	26	163
5.	Panchnama for seizure of clothes of dead body of Champaksinh dated 29.3.98.	27	167
6.	The panchnama in regard to production of Muddamal by accused Takhatsinh.	28	169
7.	The panchnama in regard to production of Muddamal by accused Sursinh and Bhagvanbhai dated 12.4.98.	29	171
8.	The medical certificate showing injuries sustained by the complainant.	37	191
9.	Medical certificate showing injuries sustained by Gajraben.	38	193
10.	P.M. Note.	24	151
11.	Police report for P.M..	46	229
12.	The medical paper of medical hospital, Karamsad in regard to the treatment given to Champaksinh.	40	197
13.	Map of the place of offence.	32	179

4.11 After recording of the evidence of the

prosecution witness was over, the trial Court explained to the Accused, circumstances appearing against them and recorded their further statement under Section 313 of the Code.

4.12 In their further statement, the Accused denied the case of the prosecution in toto. They have stated that false case has been filed against them. However, they have neither led any evidence nor examined any witness in support of their defence.

4.13 On appreciation, evaluation and scrutiny of the evidence on record, the trial court held that there was no sufficient evidence as to formation of unlawful assembly with common object. It is also held that there was first heated exchange of words between the parties, and thereafter there was assault. It is held that Accused No.1 Mansinh Jenabhai Jadav has given stick blow on the head and shoulder of PW-1 Laxmanbhai Jenabhai Jadav whereas Accused No.7 - Sursinh Mansinh Jadav has given stick blow to Champaksinh Laxmansinh on his head which has resulted into fracture of skull at two places - Occipital Bone and Base of Skull, and the membranes were torn at the site of cerebral injury.

4.14 On the aforesaid finding, the trial Court has acquitted Accused Nos. 2 to 6 and 8 of the offences with which they were charged and the Accused No.1 was convicted for the offence punishable under Section 323 IPC and sentenced

to suffer SI for 3 months whereas Accused No.7 was convicted for the offence punishable under Section 302 IPC and sentenced to imprisonment for life and fine of Rs.1000 and in default of payment of fine, to undergo RI for 3 months, which has given rise to the instant appeal at the instance of the original Accused No.7.

5. Mr. Anil N. Mehta, learned advocate appointed by legal aid has contended that as per the say of the complainant Laxmansinh Jenabhai Jadav in his complaint, which is at exh. 14, all the Accused gave stick blows to his son Champaksinh. However, he has denied his version in his deposition at exh.13 that Accused No.7 - Sursinh gave stick blow to his son on his head. Therefore, there is a variance in the complaint as well as oral testimony of PW-1 Laxmansinh Jenabhai Jadav, which impeaches the credibility of his evidence. It is also emphasized by him that as per the evidence of PW-4 Gajraben Laxmanbhai, who is the mother of the deceased and wife of the complainant, she was given kick and fist blow by Accused No.1 whereas her husband PW-1 has deposed in his deposition that all the Accused had given kick and fist blows to his wife Gajraben. Therefore, according to him, there are material contradiction in the oral testimony of the witnesses examined by the prosecution. Therefore, no credence can be given to the evidence of the witnesses examined by the prosecution. It is also highlighted by

him that incident took place on a trifle issue of allegation of theft by the complainant, and even according the complainant, the Accused came to him to ask with regard to the allegation made by the complainant against the Accused. Therefore, there was no intention of the Accused to commit such a grievous crime either against the complainant or any of his family members. It is also pointed out by him that as per the medical evidence, in column no. 8 of the PM Note, Spleen was enlarged, and as a result of the same he died, and therefore, offence under Section 302 cannot be made out. On aforesaid premises, it is contended by him that the prosecution has failed to prove the charge levelled against the Accused. There are material contradictions in the evidence of the eye witnesses, and therefore, the Accused is entitled to the benefit of doubt. Notwithstanding the aforesaid fact, the learned trial Court committed grave error in passing the impugned judgment and order, and the order of conviction under Section 302 and sentencing him to imprisonment for life, deserve to be quashed and set aside by allowing this Appeal. He, therefore, urged to allow this Appeal.

6. Alternatively, it is also submitted by him that if at all the evidence of the prosecution is accepted, then at the most, it is a case of 'culpable homicide not amounting to murder' punishable either under Part I or Part II of

Section 304 IPC. The Accused is in jail for more than 8 years and therefore the conviction may be altered from Section 302 to either Part-I or Part-II of Section 304 IPC, and the sentence undergone by the Accused may be treated as substantive sentence, and accordingly, the Accused may be set at liberty forthwith.

7. Per contra, Mr. R.C.Kodekar, learned APP for the Respondent State of Gujarat has supported the impugned judgment and order throughout. According to him, there is no infirmity in the prosecution evidence. It is the fight between the two families, therefore, there is no question of wrong identification. It is emphasized by him that the evidence of the complainant as well as other witnesses were consistent with regard to the assault made by the Accused on the deceased Champaksinh Laxmansinh. The Accused assaulted the deceased Champaksinh on his head by stick blows, which has resulted into two fractures in the skull bone and as a result of the same he died. Therefore, it is a clear case of murder and no exception is attracted to bring the case within four corners of 'Culpable homicide not amounting to murder', punishable under Section 304 Part-I and Part-II. Therefore, according to him, the impugned judgment and order does not call for any interference by this Court. He, therefore, urged to dismiss the Appeal.

8. We have considered the submissions advanced by Mr. Anil N. Mehta, learned advocate of the Appellant and Mr. R.C.Kodekar, learned APP for the Respondent - State of Gujarat. We have perused the impugned judgment and order, and the set of evidence supplied by him during the course of his submission. We have also undertaken a complete and comprehensive appreciation of all vital features of the case and the entire evidence on record, which is read and re-read by the learned advocates of the parties with reference to broad and reasonable probabilities of the case.
9. There is no dispute to the effect that the deceased Champaksinh Laxmansinh died homicidal death. In this connection, prosecution has examined and relied upon the evidence of PW-7 - Dr. Sunilbhai Bipinchandra Bhatt at exh. 22, who has performed autopsy on the dead body of the deceased Champaksinh Laxmansinh and produced autopsy report at exh. 24. On a conjoint reading of oral testimony of PW-7 - Dr. Sunilbhai Bipinchandra Bhatt at exh. 22 and the PM Note at exh. 24, it is seen that the skull of the deceased was fractured at two places - occipital bone and base of skull. The membranes were torn at the site of cerebral injury, scalp was contused around injury, and there was haematoma. Brain and spinal cord of the deceased sustained external injury and also congested, inflamed and injected with blood and blood clots. The panchnama at exh. 16 also

supports the injury sustained by the deceased, and therefore, it is duly proved and established that the deceased Champaksinh Laxmansinh died a homicidal death. The learned trial Judge has, therefore, rightly recorded the finding that the deceased died a homicidal death, and we affirm the said finding.

10. Now the next question, which is required to be answered by this Court is, as to whether the Accused is the author of the injuries sustained by the deceased Champaksinh Laxmansinh.

11. In this connection, first of all we have to scrutinize the evidence of PW-1 Laxmanbhai Jenabhai Jadav at exh. 13. He has inter alia stated that his wife Gajrabai, his sons - Champakbhai, Kanubhai and Bhailalbhai were staying with him at the time of incident, which took place at 1:30 pm on 28.3.1998 outside his residence at village Sarol. At that time, the accused persons came with bamboo and wooden sticks. Mansinh and Sursinh had bamboo sticks, and remaining accused persons had wooden sticks of Ganda Baval. According to him, Mansinh Jenabhai hit him with his stick on his head and shoulder. The other accused persons had given kick and fist blows to his wife Gajrabai. When his son, Champak came to save them, Sursinh Mansinh gave stick blow to his son Champaksinh on his head, as a result of which, he fell down. Thereafter, people from the nearby locality gathered there and they had taken Champaksinh to

Karamsad Hospital. From Karamsad Hospital, Champaksinh was taken to Vadodara for medical check up, and he was brought back to Karamsad Hospital, where he died during the treatment. PW-1 - Laxmansinh Jenabhai Jadav had filed complaint with the police which is at exh. 14. The reason for the incident was said to be the belief of the accused persons that the complainant was making false allegation of theft against the son of Mansinh. PW-1 Laxmansinh Jenabhai Jadav has identified the wooden sticks used for committing the offence. He had also identified Article 1 - 'pant' put on by the accused at the time of his death. In his cross-examination, he admitted that there were several other families also residing in the same locality, near the place of offence, and that he knew the difference between a bamboo stick and a wooden stick, and as per his say in the cross-examination, in an unconscious state, he was taken to hospital, and as such he could not tell the doctor that he was assaulted by Danti. He and his wife were at Karamsad hospital and they had not gone to Vadodara with Champaksinh. He denied the suggestion made by Shri Gosai, advocate for the Accused in his cross-examination, that he had no knowledge as to who hit whom. As such, he did not file complaint at Bhadran Police Station. However, he admitted that complaint was taken at night on the next day of the incident. He denied the suggestions made by advocate Gosai that deceased Champaksinh was given push by Sitaben, as a result of which,

he dashed with the pillar, resulting head injury to him.

12.The prosecution, thereafter, examined and relied upon the evidence of PW-5 Fatesing Khudsang at exh. 20. He is a neighbour of the parties and also an eye witness, but he has not supported the prosecution story. He was, therefore, confronted with his previous statement recorded by the police. He has testified that there was a fighting between the parties, but he had not given details thereof. In cross-examination also, he has stated that there was some heated exchange of words between the parties.

13.The prosecution has thereafter examined and relied upon the oral testimony of PW-6 - Shardaben Laxmanbhai at exh. 21. She has inter alia stated that the Accused is her uncle and Sursinh Mansinh Jadav is the youngest son of the Accused. She has stated that Sursinh Mansinh Jadav had given stick blow on the head of her brother.

14.On reappraisal of the aforesaid evidence, there is no evidence as to formation of unlawful assembly with the common object. More over, as seen from the evidence of PW-5 - Fatesing Khudsang at exh. 20 that though he has been declared hostile, but as per the settled principle, the evidence of hostile witness cannot be totally washed off, it is seen that there was first heated exchange of words between the parties and thereafter there was assault.

Therefore, the trial Court has very rightly held that the prosecution has failed to prove the formation of unlawful assembly. It is duly proved that the Accused is the author of the injury caused to the deceased. However, there is evidence to the effect that the assault by the Accused persons was made after heated exchange of words, therefore, in view of the aforesaid fact situation, the question that arises for consideration is, as to whether the offence alleged to have been committed by the Accused, is an offence of murder, punishable under Section 302 IPC or the offence of 'Culpable homicide not amounting to murder', falling either under Part I or Part II of Section 304 IPC.

15.In the case of Lachman Singh v/s State of Haryana, (2006) 10 SCC 524, Supreme Court has held that if occurrence takes place in course of sudden quarrel, conviction of appellant is required to be altered from Section 302 to Section 304 Part-I.

16.In the case of Harendra Nath Borah v. State of Assam, 2007 AIR SCW 4631, Supreme Court has clearly set out the distinction between 'murder' and 'culpable homicide not amounting to murder'. In the said case deceased Truck Driver was assaulted by accused-police personnel and thereafter left on the road after he became senseless. In that case, the Supreme Court has altered conviction recorded under Section 302 to

304 Part-I.

17.Applying the principle laid down by the Supreme Court in above referred to two judgments, to the facts of the instant case, there is a consistent evidence that there was heated exchange of words between the parties, leading to the assault in the heat of passion, and therefore, the case clearly falls within the fourth exception of Section 300 IPC. When the factual background of the case is analysed on the touchstone of principles in above referred to judgments, the inevitable conclusion is that the present case falls within the fourth exception of Section 300, which in turn stipulates that culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offenders having taken undue advantage or acted in a cruel or unusual manner. In the instant case, at the cost of repetition be it stated that there was heated exchange of words and in the heat of passion the Accused inflicted a stick blow on the head of the deceased, therefore, he had a knowledge that this injury would cause death of the deceased, and therefore, according to us, the act of the Accused is punishable under Section 304 Part I IPC 'culpable homicide not amounting to murder'.

18.Seen in the above context, the impugned judgment and order convicting and sentencing the Accused

for commission of the offence punishable under Section 302, deserves to be altered into the offence punishable under Section 304 Part-I IPC, and accordingly, the Appeal deserves to be allowed to the said extent.

19.For the foregoing reasons, the Appeal succeeds in part and accordingly it is partly allowed. We uphold the conviction of the Accused for commission of the offence of murder of Champaksinh Laxmansinh . However, we alter the conviction recorded under Section 302, to Section 304 Part-I IPC.

20.It is stated by Mr. R.C.Kodekar, learned APP on the basis of the jail remark sheet that the accused is in jail for more than 8 years. Therefore, according to us, custodial sentence of more than 8 years would meet the ends of justice. The jail authority is, therefore, directed to set at liberty the Accused forthwith, if his presence is not required in connection with any other offence. Appeal is accordingly disposed of.

(A.M.Kapadia, J)

(H.N.Devani, J)